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Abbeville County School District v. State: The Right to a Minimally Adequate Education in South Carolina

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ABBEVILLE COUNTY SCHOOL DISTRICT V. STATE: THE RIGHT TO A MINIMALLY ADEQUATE EDUCATION IN SOUTH CAROLINA*

I. INTRODUCTION

In the recent case *Abbeville County School District v. State*,[1] the South Carolina Supreme Court addressed the requirements of article eleven, section three of the South Carolina Constitution, which states in part that "[t]he General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State."[2] The court found this section mandated a "minimally adequate" system of public schools and detailed certain characteristics of a minimally adequate school system.[3] The dissent, however, maintained that the separation of powers doctrine prevented the judiciary from reviewing the adequacy of the purely legislative function of implementing this clause.[4]

This Note reviews *Abbeville* by focusing on the judiciary's interpretation of the South Carolina Constitution's education clause in relation to three waves of education finance reform litigation.[5] Part II of this Note describes *Abbeville*, the historical development of public education in South Carolina, and the three waves of education finance reform litigation. Part III analyzes the approach of other state courts in interpreting their own constitution's education clauses and the position of these decisions in the "three waves." Finally, this Note suggests the education clause of the South Carolina Constitution did provide a basis for the court's holding in *Abbeville* without violating the separation of powers doctrine.

II. BACKGROUND

A. Abbeville County School District v. State

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1. 335 S.C. 58, 515 S.E.2d 535 (1999).
2. S.C. CONST. art. XI, § 3.
3. *Abbeville*, 335 S.C. at 68, 515 S.E.2d at 540.
4. *Id.* at 70, 515 S.E.2d at 541 (Moore, J., dissenting).
5. *See* William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990) (describing three waves of education finance reform cases).

In *Abbeville*, forty impoverished public school districts and twenty of their taxpayers sued the State of South Carolina in order to challenge South Carolina's current scheme for funding public education.[6] In addition to allegations that the state's education funding scheme violated the state and federal constitution's equal protection clauses and the South Carolina Education Finance Act (EFA), the school districts asserted the state had not adequately funded education in their districts.[7] The school districts claimed this underfunding resulted in an inadequate education and thus violated the South Carolina Constitution's education clause.[8] The education clause states that "[t]he General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable."[9]

The circuit court dismissed the school district's claim, finding they did not assert a cause of action.[10] Specifically, the trial court found the education clause only requires the existence of a system of free public schools without prescribing qualitative or adequacy standards.[11] The trial court further stated the separation of powers, judicial restraint, and political question doctrines precluded judicial intervention in an area where the legislature is supreme.[12] The South Carolina Supreme Court disagreed.[13]

First, the supreme court quickly dismissed both the equal protection claims and the EFA claim.[14] The supreme court then, basing the remainder of its opinion on the South Carolina Constitution's education clause, held "the South Carolina Constitution's education clause requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education."[15] Writing for the majority, Chief Justice Finney cited a supporting phrase in the South Carolina Education Finance Act in which the General Assembly stated the purpose of the EFA was to give public school students "'at least minimum educational programs and services . . . .'"[16]

The majority, relying on similar decisions in Kentucky, Massachusetts, North Carolina, West Virginia, and other states, went on to define the constitutional requirements of a "minimally adequate education" as the existence of satisfactory and secure buildings where students can acquire:

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6. *Abbeville*, 335 S.C. at 63, 515 S.E.2d at 538.
7. *Id.* at 63-64, 515 S.E.2d at 538.
8. *Id.*
9. S.C. CONST. art. XI, § 3.
10. *Abbeville*, 335 S.C. at 63, 515 S.E.2d at 538.
11. *Id.* at 66-67, 515 S.E.2d at 539.
12. *Id.* at 67, 515 S.E.2d at 539.
13. *Id.*
14. *Id.* at 64-65, 515 S.E.2d at 538-39.
15. *Id.* at 68, 515 S.E.2d at 540.
16. *Id.* (citing S.C. CODE ANN. § 59-20-30 (Law. Co-op. 1990)).

> 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science;
> 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and
> 3) academic and vocational skills.[17]

In conclusion, the court stated the legislature has the duty of providing public education that meets these constitutional standards.[18] The court maintained no intention to assume legislative authority with its ruling but did find the complaint stated a cause of action.[19] Accordingly, the court remanded the case for a further determination of whether the South Carolina education finance system actually violated this constitutional mandate.[20]

In the dissenting opinion, Justice Moore stated the South Carolina Constitution gives the state legislature alone the right to determine the standards of public education.[21] Arguing that the education clause contains no qualitative standard, he maintained that the judiciary cannot restrict the legislature's control over education when there is no restrictive text in the constitution.[22] Justice Moore concluded his dissent by stating the legislature, through the EFA, the Education Improvement Act, and the Education Accountability Act, had already taken measures to ensure the children attending South Carolina public schools receive an adequate education.[23]

Abbeville did not raise an issue of first impression for the South Carolina Supreme Court. The court had considered the requirements of the South Carolina Constitution's education clause in two previous cases. In *Washington v. Salisbury*,[24] the South Carolina Supreme Court addressed whether a tuition charge for a public summer school class violated section three of the education clause.[25] The court held summer school is not a part of the constitution's grant of a free public school system, thereby rendering the charge allowable.[26] More importantly, the court found the constitution unambiguously states that the

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17. *Id.* The South Carolina Supreme Court derived these criteria from cases heard by courts in other jurisdictions. Specifically, the court cited *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Secretary of the Executive Office of Education*, 615 N.E.2d 516 (Mass. 1993); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); and *Randolph County Board of Education v. Adams*, 467 S.E.2d 150 (W.Va. 1995). *Id.* The criteria stated by the court in *Abbeville* most closely resemble those cited in *Rose*, 790 S.W.2d at 212.

18. *Abbeville*, 335 S.C. at 69, 515 S.E.2d at 541.

19. *Id.*

20. *Id.*

21. *Id.* at 70, 515 S.E.2d at 541 (Moore, J., dissenting).

22. *Id.* (Moore, J., dissenting).

23. *Id.* at 71, 515 S.E.2d at 542 (Moore, J., dissenting).

24. 279 S.C. 306, 306 S.E.2d 600 (1983).

25. *Id.* at 307, 306 S.E.2d at 600.

26. *Id.* at 308, 306 S.E.2d at 601.

General Assembly is solely responsible for providing a free system of public schools.[27]

Richland County v. Campbell[28] addressed a challenge that the system for financing public education was unconstitutional under the education clause of the South Carolina Constitution.[29] In this case, the court stated that the General Assembly's powers over public education are virtually unlimited and the details of providing the free public school system are left by the constitution to the legislature's best judgment.[30] Each of the preceding cases was the result of a complicated series of events that formed public education in South Carolina.

B. Historical Development of Public Education in South Carolina

Public education in South Carolina began partially because of the efforts of the Anglican Church.[31] As the Society for Propagating the Gospel in Foreign Parts sent teachers and ministers from England to the new colonies, private citizens began contributing money for education.[32] A statute was enacted in 1710 creating an education commission with the power to administer these donations.[33] The regime envisioned by this law, however, was never achieved because the governor, the only person with authority to call an education commission meeting, passed away immediately after the law was enacted.[34]

Two 1712 acts eventually replaced the 1710 legislation.[35] The first gave funds to a teacher sent to South Carolina by the Society for Propagating the Gospel in Foreign Parts.[36] The act also appointed an individual to be the Charleston schoolmaster with removal power vested only in the General Assembly.[37]

The second 1712 act created a free school in Charleston.[38] A commission and schoolmaster were appointed to supervise the school, and an annual appropriation was made to pay the schoolmaster's wages.[39] The free school, however, was not a typical public school; the education commissioners could only give a free education to twelve students per year.[40] Although everyone else

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27. *Id.*
28. 294 S.C. 346, 364 S.E.2d 470 (1988).
29. *Id.* at 348, 364 S.E.2d at 471.
30. *Id.* at 349, 364 S.E.2d at 472 (citing Hildebrand v. High School District No. 32, 138 S.C. 445, 136 S.E. 757 (1927)).
31. 2 JAMES LOWELL UNDERWOOD, THE CONSTITUTION OF SOUTH CAROLINA 28 (1989).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 29.
38. *Id.*
39. *Id.*
40. *Id.*

had to pay, this free school was still a significant step toward modern public schools because it was publicly supported and regulated.[41]

The Revolutionary War and statehood, along with the decline of the Anglican Church, led to changes in the allotment of educational funds.[42] A law enacted by the legislature in 1811 provided that "'every citizen of the state [was] entitled to send his or her child or children, ward or wards, into any free school in the district where he or she may reside free from any expense whatsoever on account of tuition . . . .'"[43] The law further stated, when the number of applicants exceeded capacity, poor children were given priority over those with the ability to fund their own education.[44] Thus, this law approached a more modern public school philosophy.[45]

The 1811 law also mandated that the number of a district's public schools equal the number of the district's representatives in the legislature.[46] However, this method of allocation was a very inexact indicator of a district's need for public schools because representation in the state legislature was based equally on the number of white residents and the sum of taxable property in a district.[47] Moreover, all schools received an equal amount of funding ($300 per year) notwithstanding the number of students or financial need.[48] Finally, the 1811 law allowed the General Assembly to retain control over the schools by selecting certain individuals to sit on the board of commissioners for each district and by dictating a basic curriculum.[49]

In 1835, the General Assembly created a new method of addressing the needs of individual school districts.[50] Districts were divided into subdivisions, and one of the district commissioners oversaw each subdivision.[51] Nevertheless, this system still had a major flaw: local citizens could influence educational decisions only through their legislators.[52]

Realizing South Carolina's educational system needed better local control and more citizen involvement, Stephen Elliot, Jr. and J.H. Thornwell, professors at South Carolina College, made a futile attempt at reform beginning in 1839.[53] Their suggestions included the following: centralizing control in a State Superintendent of Education, apportioning educational resources on the

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41. *Id.*
42. *Id.* at 30.
43. *Id.* at 31 (citing Act No. 1980 of 1811, § III, 5 S.C. STATUTES AT LARGE 639 (McCord 1839)).
44. *Id.*
45. *Id.*
46. *Id.* at 30.
47. *Id.*
48. *Id.*
49. *Id.* Local commissioners could add to the state mandated curriculum. *Id.*
50. *Id.* at 31 (citing Act of 1835, No. 1980, § VI, 6 S.C. STATUTES AT LARGE 529-30 (McCord 1839)).
51. *Id.*
52. *Id.*
53. *Id.*

basis of the number of children in the district who needed an education, spending funds granted to each school district according to the Secretary of Education's and local educational board's policies, developing a teacher training school, incorporating the Bible into studies, and increasing educational spending.[54] Because none of these suggestions were adopted immediately, Charleston created its own public schools after studying successful school systems in other states.[55] However, the beginning of the Civil War shifted attention away from education reform.[56]

The Constitutional Convention of 1868 adopted South Carolina's first constitutional education article. Article ten of the 1868 South Carolina Constitution provides for a State Superintendent of Education, a State Board of Education, compulsory attendance for all students between six and sixteen years of age, and schools for the deaf and blind.[57] Section three of the education article stated:

> The General Assembly shall . . . provide for a liberal and uniform system of free public schools throughout the State, and shall also make provision for the division of the State into suitable school districts. There shall be kept open at least six months in each year one or more schools in each school district.[58]

This section was passed without amendment or debate in the same form as that originally proposed by the education committee at the 1868 Constitutional Convention.[59]

The compulsory attendance requirement did trigger legislative debate.[60] Whether arguing for or against compulsory attendance, the statements of several delegates revealed the importance of the educational system created in section three of the 1868 constitution. Mr. A.J. Ransier stated that civilization progresses "in proportion to the education of the people."[61] Further, Mr. R.B. Elliott declared:

> If [students] are compelled to be educated, there will be no danger of the Union, or a second secession of South Carolina from the Union. The masses will be intelligent, and will become the great strength and bulwark of republicanism. If

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54. *Id.* at 32.
55. *Id.*
56. *Id.*
57. S.C. CONST. of 1868, art. X, §§ 1-2, 4, 7.
58. S.C. CONST. of 1868, art. X, § 3.
59. 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, at 655 (1868).
60. *See id.* at 685-709.
61. *Id.* at 688.

> they remain uneducated, they will inevitably remain ignorant, and it is a well known fact, that ignorance is the parent of vice and crime, and was the sustainer of the late gigantic slaveholder's rebellion.[62]

Finally, in defense of compulsory education, Mr. B.F. Whittemore argued, "let us provide for the diffusion of intelligence, and we keep out of the jails and penitentiaries a large number of people."[63]

South Carolina's Constitution and its education article were revised in 1895. Article eleven, the education article of the 1895 Constitution, retained the State Superintendent of Education and the State Board of Education.[64] However, compulsory attendance was not included.[65] Article eleven also added an entirely new provision in section seven that provided "[s]eparate schools shall be provided for children of the white and colored races."[66] Furthermore, the wording of the clause giving the General Assembly authority to establish the public school system was changed to state:

> The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years, and for the division of the Counties into suitable school districts, as compact in form as practicable, having regard to natural boundaries, and not to exceed forty-nine nor be less than nine square miles in area . . . .[67]

No debate regarding the adoption of this section was recorded in the official record of the 1895 Constitutional Convention.[68] Only the Chief Executive's comments regarding education at the beginning of the convention were put on paper. He observed, "[i]t is a principle of government that the best educated people are the happiest and easiest governed."[69]

The General Assembly approved the Committee to Make a Study of the South Carolina Constitution of 1895 (the West Committee) by a concurrent resolution passed on April 7, 1966.[70] After three years of work, the West

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62. *Id.* at 694-95.
63. *Id.* at 700.
64. S.C. CONST. of 1895, art. XI § 1-2.
65. *See* S.C. CONST. of 1895, art. XI.
66. S.C. CONST. of 1895, art. XI, § 7.
67. S.C. CONST. of 1895, art. XI, § 5.
68. *See* CONSTITUTIONAL CONVENTION OF 1895, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA, at 554-555 (1895).
69. *Id.* at 12.
70. COMMITTEE TO MAKE A STUDY OF THE S.C. CONSTITUTION OF 1895, FINAL REPORT OF THE COMM. TO MAKE A STUDY OF THE S.C. CONSTITUTION OF 1895, at Transmittal Letter (1969). The West Committee took its name from its chairman, then Senator John C. West, who was governor of South Carolina from 1969 to 1971.

Committee recommended various changes to the 1895 South Carolina Constitution,[71] including changes to the education article.[72]

The West Committee recommended the education article be reduced to four sections instead of the twelve sections listed in the 1895 constitution.[73] The first two sections created a State Board of Education and a Superintendent of Education similar to the ones created in 1895.[74] The third section recommended a free public school system with a new provision stating that "[t]he General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize, and support such other public institutions of learning, as may be desirable."[75] The West Committee's final report explicitly states, "[t]he phrase 'free public school system' permits the General Assembly to define the concept by law," a statement which infers public education is the sole responsibility of the legislature.[76] The fourth section proscribed public funds for religious and private educational institutions.[77]

The committee's working papers give further insight into why the third section was structured as it was in the committee's proposal. Section five of the 1895 constitution, which required public schools be free to all students, had been eliminated even before the committee began its revision efforts because South Carolina citizens questioned the provision of a system of free public education.[78] Referring to the constitutions of other states, the committee found that "[a]lmost all constitutions do give the General Assembly a mandate on public education and almost all require such schools be free."[79] In recommending a section that again required a free public school system, the committee thus stated that the proposed provisions succinctly and adequately provided for both public and higher educational systems.[80]

The committee also recommended the deletion of various sections of the education article of the 1895 constitution.[81] Most importantly, the committee recommended removing the provision of the 1895 constitution that provided for separate schools for whites and blacks.[82] The committee stated the United States Supreme Court decisions had, in effect, made this provision

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71. *Id.*
72. *See id.* at 98-103.
73. *See id.*
74. *Id.*
75. *Id.* at 98.
76. *Id.* at 99.
77. *Id.* at 98.
78. Working Paper #4, *in* 4 PROCEEDINGS OF THE COMM. TO MAKE A STUDY OF THE CONSTITUTION OF SOUTH CAROLINA (1895), at 10 (on file with the University of South Carolina Law Library).
79. *Id.*
80. *Id.* at 11.
81. *See* FINAL REPORT OF THE COMM. TO MAKE A STUDY OF THE SOUTH CAROLINA CONSTITUTION OF 1895, at 101-03.
82. *Id.* at 103.

unconstitutional.[83] Therefore, it could not be enforced and should not be included.[84] As education clauses such as this one became much more common, litigation based on these clauses began to arise.

C. The Three Waves of School Finance Reform Litigation

The financing of public education, guaranteed by almost all state constitutions, has been the subject of many courtroom battles. Commentators, beginning with William E. Thro, have generally divided school finance litigation into three waves.[85] During the first wave, lasting approximately from 1971 to 1973, school finance reform litigation was based on the United States Constitution's Equal Protection Clause.[86] Plaintiffs initially contended the Equal Protection Clause gives each school district within a state the right to equal funds.[87] After this theory was rejected by two federal courts, plaintiffs introduced a new "fiscal neutrality" theory based on the Equal Protection Clause.[88] This theory maintained that "state financing schemes that allowed the quality of a child's education to vary with the wealth of his or her parents denied that child equal protection."[89] This first wave of school finance litigation began with the California Supreme Court's acceptance of the fiscal neutrality theory in *Serrano v. Priest*,[90] but ended shortly thereafter with the United States Supreme Court's decision in *San Antonio School District v. Rodriguez*.[91]

The second wave of school finance litigation, lasting approximately from 1973 to 1989, began just thirteen days after *Rodriguez* with the New Jersey Supreme Court's decision in *Robinson v. Cahill*[92] and focused on two distinct clauses in state constitutions.[93] This wave of litigation focused on education clauses, contained in all state constitutions except Mississippi's.[94] The second wave also focused on state constitution's equal protection clauses or their functional equivalent.[95] Plaintiffs urged state courts to find that "education was

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83. *Id.*

84. *Id.*

85. *See* William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990).

86. *Id.* at 222-23.

87. *Id.* at 223.

88. *Id.*

89. William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1650 (1989).

90. 487 P.2d 1241, 1249-51 (Cal. 1971) (holding California's educational finance system violative of both the federal and state equal protection clauses because educational quality was directly related to the wealth of the child's parents).

91. 411 U.S. 1, 55 (1973) (holding that school finance reform at issue did not violate the federal Equal Protection Clause.

92. 303 A.2d 273 (N.J. 1973) (*Robinson I*).

93. Thro, *supra* note 85, at 228.

94. *Id.* at 229.

95. *Id.* at 229-30.

a fundamental right, that wealth was a suspect class, or that the finance system was irrational."[96] Even in this wave, plaintiffs' victories occurred much less frequently than their defeats.[97]

In the third wave of school finance reform litigation, which still continues today, state court holdings rely exclusively on the education clauses in state constitutions.[98] This allows courts to apply their decisions only to education litigation.[99] Courts may be more receptive to this sort of decisionmaking because a decision based on an education clause does not affect other areas of the law as much as a decision based on an equal protection clause.[100] With the exclusive focus on the education clauses of state constitutions, the differences between the education clauses have become more important.[101]

Education clauses can be divided into four categories.[102] Category I clauses contain the fewest educational requirements.[103] These clauses "provide for a system of free public schools and nothing more."[104] In contrast, Category II education clauses impose a minimum qualitative standard on public schools.[105] For example, the Kentucky Constitution's requirement of an "efficient system of common schools" is a minimum qualitative standard.[106] Category III education clauses contain a specific education requirement and a preamble which states their purpose.[107] The California Constitution, a perfect example of a Category III clause, provides, "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."[108] Category IV

96. *Id.* at 230 (footnotes omitted).
97. *Id.* at 232.
98. *Id.* at 239.
99. *Id.*
100. *Id.* at 241.
101. *Id.* at 243. Some have claimed the third wave has collapsed because courts have questioned their legitimacy, which includes separation of powers, political question, and federalism concerns, and their competency, which includes their ability to understand the problem and develop a solution in an area where the courts are not experts. *See* Kevin Randall McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867, 1890 (1998). A fourth wave of school finance reform litigation may come into existence "characterized by the inclusion of the racial and ethnic divide in plaintiff's claims or the use of two distinct state constitutional provisions that coalesce to create a more viable cause of action for the plaintiffs." *Id.* at 1900 (citing Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996)).
102. Thro, *supra* note 89, at 1661.
103. *Id.* at 1661.
104. *Id.* at 1662.
105. *Id.* at 1663.
106. *Id.* (citing KY. CONST. § 183).
107. Thro, *supra* note 85, at 244-45.
108. *Id.* at 245 n.138 (citing CAL. CONST. art. IX, § 1).

clauses contain the greatest requirements and generally describe state education as "'fundamental,' 'primary,' or 'paramount.'"[109]

William E. Thro maintains Category I education clauses provide no basis for school finance reform because the legislature's duty is only to create a system of public schools.[110] Still, Thro notes that the Connecticut Supreme Court, in interpreting the Category I education clause in its own constitution, found school finance reform necessary.[111] However, Thro contends the court's holding was based on the equality guaranty clause in the constitution.[112] In contrast, Thro states Category IV clauses provide a proper basis for mandating school finance reform because "[t]he provision imposes a continuing multifaceted obligation on the legislature, and school finance reform obviously is one aspect of that duty."[113]

Additionally, Thro contends that third wave cases should be analyzed using a five-question model.[114] First, the court must determine if the case before it is an equality suit or a quality suit.[115] Second, if the court is hearing a quality suit, the court must determine if the state's education clause contains a qualitative standard, by looking at the four categories of education clauses.[116] If the clause contains a qualitative standard, the court must then define this standard.[117] Next, the court must determine if the school districts involved in the suit meet this standard.[118] Finally, if the court finds the entire educational system does not meet the constitutional standard, the court must determine the role of funding in improving the system so that it meets the constitutional mandate.[119]

These three waves indicate that much history preceded the South Carolina Supreme Court's decision in *Abbeville*. When *Abbeville* was decided, most other state courts were focusing on the education clause alone in making a determination in education finance reform litigation. Thus, the South Carolina Supreme Court's decision in *Abbeville* seems to fit into the third wave of education finance reform litigation.

III. ANALYSIS

Because providing public education is an important state function, almost all state constitutions include sections that address the requirements of a public

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109. Thro, *supra* note 89, at 1667-68.
110. Thro, *supra* note 85, at 246.
111. *Id.* at 248 n.162 (citing Horton v. Meskill, 376 A.2d 359 (1977)).
112. *Id.*
113. *Id.* at 246.
114. William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 605 (1994).
115. *Id.*
116. *Id.*
117. *Id.* at 607.
118. *Id.*
119. *Id.* at 607-08.

educational system. The prevalence of these education clauses means that *Abbeville* is hardly a case of first impression in the United States. However, *San Antonio Independent School District v. Rodriguez*[120] seems to end any participation by the federal courts in determining substantive educational rights under the United States Constitution.[121] As a result of the lack of federal participation, many states have dealt with the same issue raised in *Abbeville*, namely whether a clause guaranteeing a free public school system requires a minimally adequate education. The courts of Connecticut, New Jersey, West Virginia, Texas, and Kentucky have all had occasion to interpret their own constitution's education clauses. Their holdings may provide insight into the nuances of education finance reform litigation and why the South Carolina Supreme Court held as it did in *Abbeville*.

A. Interpretation of Education Clauses in Other Jurisdictions

1. Connecticut

Article eight, section one of the Connecticut Constitution, which is very similar to the South Carolina Constitution's education clause, states "[t]here shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation."[122] The meaning of this provision was addressed by the Connecticut Supreme Court in *Horton v. Meskill*.[123]

In *Horton*, the plaintiffs claimed that Connecticut's system of financing public education violated the state and federal equal protection clauses as well as the state constitution's education clause.[124] The court in *Horton* held that education is a fundamental right in Connecticut.[125] The court found that Connecticut's system of public educational funding was based primarily on local property tax levies that did not take into account differences in wealth between districts. Moreover, the system lacked any additional state funds for property-poor districts.[126] The court held that this method of educational funding violated the education clause because it did not provide similar opportunities to all students attending public schools in Connecticut.[127]

120. 411 U.S. 1 (1973).

121. *See* Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU. EDUC. & L.J. 1, 10 (1997).

122. CONN. CONST. art. VIII, § 1.

123. 376 A.2d 359 (Conn. 1977).

124. *Id.* at 361.

125. *Id.* at 373.

126. *Id.*

127. *Id.* at 374.

The court, following the early separation of powers tendency to leave the solution to the legislature,[128] left any remedy to the legislature's discretion.[129] The court stated that "the fashioning of a constitutional system for financing elementary and secondary education in the state is not only the proper function of the legislative department but its expressly mandated duty under the provisions of the constitution of Connecticut, article eighth, § 1."[130] Providing guidance to the legislature, the court further stated that strict equity was not constitutionally mandated.[131] Thus, in fashioning its remedy, the legislature was able to consider the unique needs and interests of the various school districts.[132]

Horton was decided during the second wave of education finance reform litigation. The Connecticut Supreme Court's decision typified the main characteristic of these second wave cases by utilizing both the state constitution's equal protection clause and its education clause to invalidate the education financing system. The court did not have to utilize both of these clauses in its decision. It could have ended its analysis after finding education was a fundamental right because this finding was enough to hold the financing system inadequate under the constitution's equality guarantee.[133] Nevertheless, the court also found the constitution's education clause useful. The Connecticut Supreme Court stated that "in the light of the Connecticut constitutional recognition of the right to education (article eighth, § 1) it is, in Connecticut a 'fundamental' right."[134] This statement indicates that the Connecticut Supreme Court relied on both clauses in holding the education financing system inadequate.

Under Thro's analysis, Connecticut's education clause alone may not have been enough to invalidate the school financing system. Although categorical analysis of the education clauses is generally confined to third wave cases, Connecticut's education clause, which simply requires a free public school system, must be a Category I clause.[135] Thro contends:

> To somehow hold that a Category I clause calling for a system of free public schools of unspecified quality is the basis for reform would be ridiculous. According to the very

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128. *See* Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by* Sheff v. O'Neill– *and a Proposed Solution*, 29 CONN. L. REV. 1115, 1139 (1997).

129. *Horton*, 376 A.2d at 375.

130. *Id.* The same plaintiffs returned to court eight years later to challenge the new education financing scheme as unconstitutional. The Connecticut Supreme Court found the system constitutional but harmed by legislative inaction in fully implementing it. *See* Horton v. Meskill, 486 A.2d 1099 (Conn. 1985).

131. *Horton*, 376 A.2d at 376.

132. *Id.*

133. Thro, *supra* note 85, at 230.

134. *Horton*, 376 A.2d at 373.

135. Thro, *supra* note 85, at 243 n.131.

> terms of the provision, the legislature has met its obligation simply by setting up a free public school system.[136]

If Thro's contention is accurate, the ruling of the Connecticut Supreme Court that the school finance system must be reformed had to be based, at least in part, on the equality guarantee. The education clause does not otherwise provide a valid basis for mandating reform. Furthermore, the *Horton* opinion seemingly did not violate the separation of powers doctrine. The *Horton* court simply found the present system inadequate; it did not define adequacy or command the legislature to enact a certain system to correct the inadequacy.[137]

2. New Jersey

Article eight, section four, paragraph one of the New Jersey Constitution states that "[t]he Legislature shall provide for the maintenance and support of a *thorough and efficient system* of free public schools for the instruction of all children in the State between the ages of five and eighteen years."[138] The New Jersey Supreme Court has addressed the "thorough and efficient" provision in two series of cases: *Robinson v. Cahill*[139] and *Abbott v. Burke*.[140]

a. Robinson v. Cahill

The New Jersey Supreme Court examined the thorough and efficient clause over a series of seven cases beginning in 1973 with the first decision in *Robinson v. Cahill*[141] (*Robinson I*). In *Robinson I*, the New Jersey Supreme Court first ruled that the state constitution's equal protection clause did not provide a remedy to the problems existing in public education.[142] The court next turned to the qualitative "thorough and efficient" text to invalidate the current school financing scheme.[143] The court found that the substantial differences in per pupil expenditures in property-rich and property-poor districts justified its holding.[144] The *Robinson I* opinion then stated that the constitutional requirement of a thorough and efficient public school education

136. *Id.* at 246.

137. *See Horton*, 376 A.2d at 374.

138. N.J. CONST. art. VIII, § 4, ¶ 1 (emphasis added). The qualitative "thorough and efficient" language of this clause, while important to New Jersey case holdings, is absent from the South Carolina Constitution.

139. Robinson v. Cahill (*VII*), 360 A.2d 400 (N.J. 1976); Robinson v. Cahill (*VI*), 358 A.2d 457 (N.J. 1976); Robinson v. Cahill (*V*), 355 A.2d 129 (N.J. 1976); Robinson v. Cahill (*IV*), 351 A.2d 713 (N.J. 1974); Robinson v. Cahill (*III*), 335 A.2d 6 (N.J. 1975); Robinson v. Cahill (*II*), 306 A.2d 65 (N.J. 1973); Robinson v. Cahill (*I*), 303 A.2d 273 (N.J. 1973).

140. Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Abbott v. Burke, 495 A.2d 376 (1985).

141. *Robinson (I)*, 303 A.2d at 273.

142. *Id.* at 287.

143. *Id.* at 297.

144. *Id.*

could only mean that all school districts must provide "an equal educational opportunity."[145] The court further defined the constitution's "thorough and efficient" mandate as "embrac[ing] that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."[146]

New Jersey revisited the State's educational clause in *Robinson V.*[147] In that case, the court concluded that the Public School Education Act, enacted as a result of rulings of the New Jersey Supreme Court in previous *Robinson* cases, was "in all respects constitutional on its face, again assuming it is fully funded."[148] However, the legislature failed to fund the act.[149] Thus, in *Robinson VI*, the court forbade any public official from distributing any educational funds beginning July 1, 1976.[150] In so acting, the New Jersey Supreme Court "abruptly abandoned its deferential attitude and placed 'the school crisis squarely in the lap of the Legislature.'"[151] The *Robinson VI* court finally ended its strict adherence to the separation of powers doctrine and, in the process, showed that courts will fulfill a constitutional mandate if the legislature fails to take action.

The New Jersey Supreme Court's rulings in the *Robinson* series of cases began the second wave of school finance reform litigation.[152] The *Robinson* cases utilized both the New Jersey Constitution's education clause and its equal protection guarantee in their holdings, although the final decision to modify the current school financing system rested on the education clause alone. In particular, the New Jersey Supreme Court seized on the "thorough and efficient" clause as the basis for its holding that the New Jersey constitution's education clause requires an education that gives children sufficient preparation for their roles in society and the workforce.[153] A thorough and efficient public school system implicitly provides students with the skills to adapt to the demands of popular culture and family life.

The *Robinson* cases demonstrate the extent the judiciary will go to define a constitutional mandate without usurping legislative powers. By acting after prolonged legislative inaction, the New Jersey Supreme Court suggestion that the separation of powers doctrine is not violated by a court taking an active role in education finance reform.

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145. *Id.* at 294.
146. *Id.* at 295.
147. 355 A.2d at 129.
148. *Id.* at 139.
149. *Robinson v. Cahill (IV)*, 358 A.2d at 459.
150. *Id.* at 459.
151. Joshua S. Lichtenstein, Abbot v. Burke*: Reaffirming New Jersey's Commitment to Educational Opportunity*, 29 Hofstra L. Rev. 429, 447 (1991) (quoting Martin Waldron, *Schools in Jersey Face July Closing*, N.Y. TIMES, May 14, 1976, at A23). The legislature still did not comply with the new deadline. *Id.* On July 7, 1975, however, it enacted the state's first income tax in order to comply with the court's ruling. *Id.*
152. Thro, *supra* note 85, at 228.
153. *Robinson (I)*, 303 A.2d at 294-95.

b. Abbott v. Burke

In the *Abbott v. Burke* series of cases, the New Jersey Supreme Court held the Public School Education Act of 1975 unconstitutional as applied to poorer school districts.[154] In *Abbott I*, school children from New Jersey's poorer school districts brought a challenge to the constitutionality of the Act before the state supreme court.[155] The court initially ruled that the plaintiffs' case should be considered by a state administrative agency; the court specifically found that an administrative law judge should hear the case because the State Commissioner of Education was a named defendant.[156] After review by the State's Commissioner of Education and the Board of Education, the case ultimately returned to the New Jersey Supreme Court.[157]

The New Jersey court in *Abbott II* found the 1975 Education Act's goal of equalizing per student expenditures in property-poor districts had never been met.[158] In fact, the court stated that the 1975 educational funding scheme had caused an increase in the gap between per pupil expenditures in more- and less-advantaged districts.[159] Educational quality was also vastly lower in the poorer districts. For example, foreign language programs, music programs, and computer exposure were greatly superior in the richer districts.[160]

The court found that the existing educational system in the poorer school districts did not meet the requirements of the "thorough and efficient" clause of the New Jersey Constitution.[161] After quoting the *Robinson I* definition of the "thorough and efficient" clause, the court stated "that poorer disadvantaged students must be given a chance to be able to compete with relatively advantaged students."[162] Because of the disparity in quality and the furtherance of meaningful competition between disadvantaged and advantaged students, the court found that "in poorer urban districts something more must be added to the regular education in order to achieve the command of the Constitution."[163] The court therefore ordered that per pupil expenditures in poorer districts be made equal to those in the more advantaged districts and that they be great enough to address unique problems faced by these disadvantaged school districts.[164]

The *Abbott II* ruling had two important effects. First, courts could feel more comfortable in distancing themselves from the separation of powers

154. *Abbott v. Burke (II)*, 575 A.2d 359, 363 (N.J. 1990).
155. *Abbott v. Burke (I)*, 495 A.2d 376, 379 (N.J. 1990).
156. *Id.* at 393.
157. *Abbott (II)*, 575 A.2d at 364-65.
158. *Id.* at 382.
159. *Id.* at 383.
160. *Id.* at 395-96.
161. *Id.* at 408.
162. *Id.* at 372.
163. *Id.* at 403.
164. *Id.* at 408.

doctrine in order to declare an educational funding scheme unconstitutional.[165] Second, the decision decreased the plaintiff's burden of proof.[166] Plaintiffs could focus on the inadequacy of educational opportunities in the less advantaged districts as opposed to proving funding disparities over the entire state.[167] Moreover, the *Abbott II* ruling had important practical effects for less privileged districts. Without violating separation of powers principles, the New Jersey Supreme Court provided poorer, less advantaged districts with funds large enough so that per pupil expenditures would be effectively equal throughout the state.[168]

The *Abbott* series of cases are a part of the third wave of education finance reform litigation.[169] The New Jersey Supreme Court's holding in *Abbott* exemplified the defining characteristic of third wave litigation—an exclusive focus on the education clause of a state constitution in order to mandate substantially equal per pupil expenditures in wealthier and poorer districts. Moreover, because the New Jersey Constitution contains a "thorough and efficient" qualitative standard, it seems to fall within the Category II education clauses.[170]

The *Abbott* court fulfilled its duty to interpret this clause by determining whether the current financing system prohibited attainment of the qualitative standard imposed by the clause.[171] In finding that per pupil expenditures needed to be equalized, the court rightly determined that the current school financing system did not meet the clause's qualitative standard. Furthermore, by ordering equal per pupil expenditures, the court implicitly finished the five-question analysis proposed by Thro for third wave education finance reform.[172]

3. *West Virginia*

Article twelve, section one of the West Virginia Constitution states that "[t]he legislature shall provide, by general law, for a *thorough and efficient system* of free schools."[173] The West Virginia Supreme Court of Appeals interpreted this "thorough and efficient" clause in the 1979 case *Pauley v. Kelly*.[174]

In *Pauley*, the parents of five public school children filed a lawsuit against various state officials claiming the public school financing system violated both the "thorough and efficient" clause and the equal protection clause of the West

165. *See* Lichtenstein, *supra* note 151, at 484.
166. *Id.*
167. *Id.*
168. *Id.* at 490.
169. *See* McMillan, *supra* note 101, at 1877.
170. *See* Thro, *supra* note 85, at 244, n.134.
171. *Id.* at 246-47.
172. *See supra* notes 114-119 and accompanying text.
173. W. VA. CONST. art. XII, § 1 (emphasis added).
174. 255 S.E.2d 859 (W. Va. 1979).

Virginia Constitution.[175] In defining a thorough and efficient education, the court looked to constitutional debates as well as to thorough and efficient cases in other states.[176] The court studied the words "thorough," "efficient," and "education" as they were defined in dictionaries when the constitution was written and also looked at how other states defined these terms.[177]

The West Virginia Supreme Court of Appeals then defined a thorough and efficient education as "develop[ing], as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."[178] The court then described characteristics that such an educational system should impart to its students, including: the ability to read and perform mathematical equations, the potential to understand government functions so that informed votes can be made, the opportunity to gain enough self-awareness in order to intelligently determine career alternatives, provision of training for future careers, the promotion of cultural interests, and the development of social etiquette to facilitate working with others.[179]

The court utilized two clauses of the West Virginia Constitution to conclude:

> [B]oth our equal protection and thorough and efficient constitutional principles can be applied harmoniously to the State school financing system. Certainly, the mandatory requirement of "a thorough and efficient system of free schools," found in Article XII, Section 1 of our Constitution, demonstrates that education is a fundamental constitutional right in this State.[180]

The court then remanded the case to determine, in part, if the West Virginia system of public schools met the above characteristics.[181]

Pauley is a typical decision in the second wave of education finance reform litigation. Because the West Virginia Supreme Court of Appeals relied on both the equal protection guaranty and the education clause to determine the present school financing scheme was unconstitutional, the decision exemplified the

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175. *Id.* at 861.

176. *See id.* at 866-67.

177. *See id.* at 874-77. The court never expressly defined "thorough" or "efficient." The court simply said a thorough and efficient education usually adapts to meet the needs of beneficiaries. *Id.* at 876. The court did define education as "the development of mind, body and social morality (ethics) to prepare persons for useful and happy occupations, recreation and citizenship." *Id.* at 877.

178. *Id.* at 877.

179. *Id.*

180. *Id.* at 878.

181. *Id.*

second wave's defining characteristic of utilizing both equality guarantees and education clauses to make a decision.

The *Pauley* definition of a thorough and efficient education was approved in a later West Virginia case, *Randolph County Board of Education v. Adams*.[182] *Adams* was a declaratory judgment action filed by the Randolph County Board of Education after it lost a levy to establish a book user fee for non-needy children.[183] The court quoted the *Pauley* definition of a thorough and efficient education and the factors that characterized such a system.[184] The court then found, because the goal of public schools is to encourage students to reach their potential academically and socially, "whatever items are deemed *necessary* to accomplish the goals of a school system... must be provided free of charge to all students in order to comply with the constitutional mandate of a 'free school' system."[185] The court held textbooks are a necessary part of the public school system and must therefore be provided at no charge to students.[186]

The West Virginia Supreme Court of Appeal's decision in *Adams* typified cases in the third wave of education finance reform litigation. The court focused on the education clause alone in holding textbooks are a necessary part of public education and seized on the definition of "thorough and efficient" to provide support for its holding.[187] Because the West Virginia Constitution contains this minimum qualitative standard, it falls within the Category II education clauses. Therefore, the West Virginia Supreme Court of Appeals had a basis, in the words "thorough and efficient" for its interpretation of the state constitution's education clause.

The *Adams* court also indicated its decision was not intended to interfere with the separation of powers doctrine.[188] The role of the judiciary is to effectuate the intent of the framers of the constitution. The court found that this role included determining the legitimacy of the West Virginia public school education financing system.[189]

4. Texas

The Texas Constitution, in language that strongly contrasts that used in the South Carolina Constitution, states in article seven, section one that "[a] general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance

182. 467 S.E.2d 150 (W. Va. 1995).
183. *Id.* at 155.
184. *Id.* at 158.
185. *Id.* at 159.
186. *Id.*
187. *Id.* at 158-59.
188. *Id.* at 165.
189. *Id.*

of an *efficient system* of public free schools."[190] This constitutional provision has been at issue in three Texas cases involving the Edgewood Independent School District.

In *Edgewood Independent School District v. Kirby*[191] (*Edgewood I*), the Texas Supreme Court held that the Texas public school financing system violated the education clause of the Texas Constitution.[192] The plaintiffs presented proof that the system of funding public schools, based largely on local property taxes, led to gross disparities in per pupil expenditures and substantial differences in the quality of educational programs.[193] The court held the constitutional mandate of "efficiency" did not allow a system with such extreme gaps in quality and expenditures between the richer and poorer districts.[194] The purpose of the efficiency clause was to establish an educational system that gave rise to "the general diffusion of knowledge."[195] The court found "[t]he present system, by contrast, provides not for a diffusion that is general, but for one that is limited and unbalanced."[196] The system therefore did not meet the constitutional requirement of efficiency.[197] The Texas Supreme Court's holding in *Edgewood I* indicated that the students attending the poorer school districts were receiving an inadequate education. The goal of the court's decision seemed to be increasing per pupil expenditures in the poorer districts so that these districts could provide the educational programs and instruction necessary to meet Texas's minimum educational standards.[198] Because school districts could still provide additional funding through property tax levies, the obvious goal of the decision was not to provide equal funding to school districts, but simply to provide adequate funding.[199]

In the 1991 case *Edgewood Independent School District v. Kirby*[200] (*Edgewood II*), the identical plaintiffs returned to court alleging that the legislative response to *Edgewood I* was inadequate.[201] Texas Senate Bill 1 had attempted to provide equal revenue to school districts through biennial adjustments.[202] However, the Texas Supreme Court found the bill retained the same financing scheme as used previously and therefore caused the same

190. TEX. CONST. art. VII, § 1 (emphasis added).
191. 777 S.W.2d 391 (Tex. 1989).
192. *Id.* at 397.
193. *Id.* at 392-93.
194. *Id.* at 396.
195. *Id.*
196. *Id.*
197. *Id.*
198. *See* Richard J. Stark, *Educational Reform: Judicial Interpretation of State Constitutions' Education Finance Provisions--Adequacy vs. Equality*, 1991 ANN. SURV. AM. L. 609, 641 (1991).
199. *Id.* at 642.
200. 804 S.W.2d 491 (Tex. 1991).
201. *Id.* at 493.
202. *Id.* at 495.

problems.[203] As a result, the court found the Texas school financing system was still lacking in efficiency and extended the injunction so the legislature could again attempt to fix the problem. In this decision, the Texas court fulfilled its duty to interpret the constitution while still observing the separation of powers doctrine.

In *Edgewood Independent School District v. Meno*[204] (*Edgewood III*), the Texas Supreme Court ratified the legislature's latest efforts to meet the requirements of the Texas Constitution's education clause.[205] *Edgewood III* confirmed the court's position that "[d]istricts must have substantially equal access to funding up to the legislatively defined level that achieves the constitutional mandate of a general diffusion of knowledge."[206] Furthermore, districts could add to state funding locally through property tax levies so long as efficiency was not destroyed.[207]

The *Edgewood* cases typify the third wave of education finance reform litigation because the court focused solely on the education clause of the Texas Constitution to make its decision. The Texas Supreme Court did not even address the plaintiffs' state equal protection claim, indicating the education clause alone was enough to invalidate the present system for financing public education. The court's interpretation of its education clause seems proper. Because the Texas Constitution requires its educational system to be efficient, it imposes a minimum qualitative standard and thus seems to fit within the Category II framework.[208] In interpreting its constitution's Category II education clause, the court inquired as to whether the present financing system prohibits the achievement of the qualitative standard of efficiency.[209] The court, implicitly if not explicitly using Thro's five-question analysis for third wave cases, found that it did.

The *Edgewood* cases also implicitly addressed the separation of powers issue raised by the dissent in *Abbeville*. While the Texas Supreme Court essentially found the Texas legislature should fund education so that each district can provide at least a minimum educational opportunity, the Texas court left the details of the funding scheme to the legislature.[210] This holding did not violate the separation of powers doctrine because the court merely interpreted the Texas Constitution and did not usurp the legislative function by implementing a specific funding scheme.

5. Kentucky

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203. *Id.*
204. 917 S.W.2d 717 (Tex. 1995).
205. *Id.* at 750.
206. *Id.* at 730.
207. *Id.* at 732.
208. Thro, *supra* note 85, at 244 n.133.
209. *Id.* at 246-47.
210. *Edgewood*, 777 S.W.2d at 396.

Section 183 of the Kentucky Constitution provides that "[t]he general assembly shall, by appropriate legislation, provide for an *efficient system* of common schools throughout the State."[211] In *Rose v. Council for Better Education, Inc.*,[212] the Kentucky Supreme Court ruled that the General Assembly had violated its constitutional duty as expressed in section 183.[213]

The court stated that the Kentucky legislature was the sole government body in charge of the public school system.[214] It instructed the General Assembly to provide for a new system of funding public education that "will guarantee to all children the opportunity for an adequate education, through a *state* system."[215] The Kentucky Supreme Court further noted it was not trying to usurp legislative authority by calling for any specific bill.[216] The court was, instead, detailing what the constitutional mandate of an efficient school system entails.[217]

In developing a definition of an efficient system of public schools, the supreme court analyzed Kentucky's constitutional debates, Kentucky's legal precedents, persuasive authority from other states, and expert opinions.[218] The court concluded that an efficient education provides all students with the following abilities:

(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
(ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
(iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
(iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
(v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
(vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

211. KY. CONST. § 183 (emphasis added).
212. 790 S.W.2d 186 (Ky. 1989).
213. *Id.* at 189.
214. *Id.* at 211.
215. *Id.* at 212.
216. *Id.*
217. *Id.*
218. *See id.* at 205-11.

> (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[219]

The Kentucky Supreme Court also addressed whether its judgment, which partially affirmed the trial court, violated the separation of powers doctrine.[220] The court stated its duties were to examine the constitutionality and meaning of legislative enactments.[221] The court further noted it had simply stated the standards implicit in section 183, and the legislature could comply in any manner it thought would best address the inadequacies of the present system.[222] The court found itself in no danger of usurping the legislature's power.[223]

The Kentucky Supreme Court's holding in *Rose* is based upon its finding that the Kentucky public schools did not meet minimum standards of adequacy.[224] In so holding, the Kentucky judiciary modified the constraints of the separation of powers doctrine and took an activist role in determining the constitutional requirements of an efficient education.[225] *Rose* thus exhibits the fact that courts may take a more assertive role in the area of education finance and move away from the traditional position of granting the legislature total discretion.[226]

Rose is part of the third wave of education finance reform litigation. The Kentucky Supreme Court did not in any way analyze the case based on the equality guarantees in the Kentucky Constitution.[227] Instead, the court analyzed the case based solely on the state constitution's education clause, which is the defining characteristic of third wave cases.[228] The Kentucky Constitution's requirement of an efficient education sets forth a minimum qualitative standard. Thus, this clause seems to fall within the Category II education clauses which are capable of judicial interpretation.[229] Implicitly addressing Thro's five-question analysis for third wave cases, the Kentucky Supreme Court found that a new system of funding education was needed to meet the constitutional mandate.

Following the reasoning in *Rose*, it seems clear that the South Carolina Supreme Court's ruling in *Abbeville* did not violate the separation of powers

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219. *Id.* at 212.
220. *Id.* at 214.
221. *Id.*
222. *Id.*
223. *Id.*
224. *See* Stark, *supra* note 198, at 653.
225. *See* Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 344 (1991).
226. *Id.* at 346.
227. Thro, *supra* note 85, at 236.
228. *Id.*
229. *Id.* at 244.

doctrine. The *Rose* court found, as long as the court did not state the type of legislation needed to fulfill the constitutional requirement, the legislature can use its discretion to determine what funding scheme would best meet the needs of the present educational system. Allowing the legislature to determine the best way to achieve the constitutional mandate ensures that the separation of powers doctrine is preserved.

B. Analysis of the South Carolina Constitution's Education Clause

The South Carolina Supreme Court's decision in *Abbeville County School District v. State*[230] seems to fall within the third wave of education finance reform. Because the South Carolina Supreme Court quickly disposed of the other claims based on the federal and state constitutions, *Abbeville*'s definition of the constitution's education mandate was based on the South Carolina Constitution's education clause alone. Therefore, the court's holding exemplified the defining characteristic of the third wave of education finance reform litigation: reliance solely on the state constitution's education clause.

Because the *Abbeville* case was decided during this third wave, it is important to analyze it using Thro's five-question analysis for third wave cases. First, since the plaintiffs contended the funding system resulted in an inadequate education, *Abbeville* is definitely an adequacy case. As an adequacy case, the *Abbeville* court had to determine in which category South Carolina's education clause belonged. South Carolina's education clause only requires the legislature to create a system of free public schools; therefore, South Carolina's education clause seems to fall within Category I education clauses.[231] If Thro's analysis is correct, this type of clause alone provides no basis for mandating education finance reform. By simply creating any public school system, the South Carolina legislature had fulfilled its constitutional duty. Thus, the South Carolina Supreme Court, under Thro's analysis, seemingly had no basis for defining the constitutional mandate under the education clause alone. Nevertheless, the court did define the constitutional mandate and then remanded the case to determine if the state's present system of education funding met this standard. Thus, the fourth and fifth questions were left to be resolved on remand.

However, Thro's "textual taxonomy" of education clauses may not be entirely sound. If Thro is correct, the directive of the South Carolina Constitution's education clause that the legislature maintain and support a free public school system could be met by hiring one teacher and by building one school. If Thro is incorrect, however, the very existence of the education clause may trigger an implicit adequacy standard for which the legislature must be responsible. This latter view of the South Carolina Constitution's education

230. 335 S.C. 58, 515 S.E.2d 535 (1999).
231. Thro, *supra* note 85, at 243 n.131.

clause seems more probable. That the state constitution would contain a clause that is merely precatory is unlikely.

The South Carolina Supreme Court is correct in its reading of an adequacy standard into the state constitution's education clause. The court seemed to follow legitimate precedent for its *Abbeville* decision, drawing from the lessons of Connecticut, New Jersey, West Virginia, Texas, and Kentucky, among others, in developing its definition of a minimally adequate education. Finally, the *Abbeville* decision did not violate the separation of powers doctrine. The South Carolina Supreme Court left the details of the funding scheme to the state legislature, and its opinion did not give the state legislature any time limit in which it had to enact this funding scheme.[232] Most importantly, the court fulfilled the intent of the state constitution's framers as expressed in the constitutional conventions and by the West Committee.

IV. CONCLUSION

The South Carolina Supreme Court's decision in *Abbeville* may have opened the door to education finance reform in South Carolina, depending upon the lower court's decision on remand. The lower court may decide that the current system meets the requirements of a "minimally adequate education" as defined in *Abbeville*, and, thus, no need for public school financing reform exists. If the court decides in the alternative, however, the South Carolina Supreme Court's initial decision in *Abbeville* may have monumental effects. The *Abbeville* decision may, in fact, be the impetus for further improvements in South Carolina public schools.

Jennifer L. Fogle

232. The legislature should beware of inaction which could prompt increasing judicial activism. *See supra* note 148 and accompanying text.

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